SALEDY SDN. BHD

v.

DIRECTOR-GENERAL OF INLAND REVENUE

HIGH COURT, KUALA LUMPUR
DATUK HARUN BIN MAHMUD HASHIM J.
[TAX APPEAL NO. A7 OF 1983]
16 MAY 1994

REVENUE LAW: Appeal against decision of Special Commissioners of Income Tax - Employment agreement entered into between one Dr. Yeo and appellant - Whether additional remuneration paid to Dr. Yeo is a bonus paid to an employee and disallowed as a deductible expense beyond the limits stipulated under s. 39(1)(h) of the Income Tax Act 1967 - Whether the additional remuneration is a share of profits by an independent consultant under the terms of the employment agreement and thereby allowable as a deductible expense pursuant to s. 33 of the Income Tax Act 1967 - Whether the amount equal to the cost of air-fares for Dr. Yeo and his family is a deductible expense wholly and exclusively incurred in the production of gross income of the appellant pursuant to s. 33 of the Income Tax Act 1967 - Whether such expense not deductible it being incurred in a private and vacational nature.

The appellant was in the business of running a medical clinic and it entered into an employment agreement with one Dr. Yeo the terms of which, *inter alia*, were that Dr. Yeo was to be paid a monthly salary plus 40% net profit of the clinic subject to the share of profit not exceeding RM100,000 in any year and an amount equal to the cost of economy air-fares from Malaysia to the United Kingdom for Dr. Yeo and his family every two years.

In computing the chargeable income of the appellant, the Revenue had treated the fixed monthly remuneration paid to Dr. Yeo as director's salary and the additional remuneration based on the net profits of the clinic as bonus which was subject to restriction by virtue of s. 39(1)(h) of the Income Tax Act 1967 (the Act). The Revenue also disallowed the air-fares for Dr. Yeo and his family to the United Kingdom on the grounds that it was expenses of a private nature and not incurred in the production of income for the medical clinic.

The appellant contended that Dr. Yeo is not an employee but an independent consultant and as the limits imposed by s. 39(1)(h) of the Act is only applicable to employees, the said section was not applicable to the facts of the present case. The appellant further contended that even if Dr. Yeo is an employee, the 40% net profit paid to him is still not a bonus because the same is paid under a contract. The appellant further argued that it is legally bound to pay the air-fares to Dr. Yeo under the terms of the contract, there being no statute to restrict payment of air-fares.

The Special Commissioners found in favour of the Revenue on the additional assessment raised on the appellant and the appellant appealed.

Held:

[1] On the question of whether Dr. Yeo is an employee within the meaning of s. 2 of the Act, it was clear that paragraph (b) of each of the definitions of employee, employer and employment in s. 2 of the Act applies to the relationship between the appellant and Dr. Yeo. The employment agreement refers to the appellant as the "Employer" and Dr. Yeo as the holder of the appointment of consultant which constitutes the employment. The appellant is responsible for paying the remuneration to Dr. Yeo, notwithstanding that the appellant and Dr. Yeo are the same person acting in different capacities. The appointment of consultant is an appointment for which remuneration is payable and the employment agreement in this case is a contract of service and not a contract for services.

[2] As both parties had agreed before the Special Commissioners that the limits imposed by s. 39(1)(h) of the Act is only applicable to employees and since Dr. Yeo is an employee, the section therefore applies in respect of the 40% share of the profits subject to a maximum of RM100,000 per year which sum is clearly a bonus.

[3] The argument that Dr. Yeo, being a non-citizen resulting in the contract of employment being illegal is without merit as inspite of such illegality (if any) the income is nevertheless chargeable to income tax.

[4] On the issue of the air-fares, to qualify for deduction under s. 33 of the Act, the expense must be wholly and exclusively incurred in connection with the production of gross income of the taxpayer. Dr. Yeo had admitted that the visits to the United Kingdom were private and vacational in nature and that being the case the expense clearly cannot be both wholly and

exclusively incurred in connection with the production of gross income of the appellant. The expense therefore is caught by s. 33 read with s. 39(1)(b) of the Act.

[Appeal dismissed with costs. Deciding Order of Special Commissioners confirmed].

Cases referred to:
Wittaker v. Minister of Pensions and National Insurance [1967] 1 QB 156 ***(refd)***
Montreal v. Montreal Locomotive Works Ltd.[1947] 1 DLR 161 ***(refd)***
Ready Mixed Concrete v. Minister of Pensions and National Insurance [1968] 1 All ER 433 ***(refd)***
The Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd. [1988] 2 MLJ 99 ***(foll)***
Mann v. Nash [1922] 1 KB 752 ***(refd)***
Southendon-Sea Corporation v. Hodgson Ltd. [1962] 1 QB 416 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 2, 13, 33, 39(1)(b), (h), 91(1)

For the appellant - Lim Kean Siew; (Mary Yeo with him); M/s. Lim Kean Siew & Co.
For the respondent - Zulkefli bin Ahmad Makinudin, FC

JUDGMENT

Harun bin Mahmud Hashim J:
This is an appeal by way of case stated from the Special Commissioners of Income Tax. The questions for their determination were:

(a) Whether the additional remuneration paid to Dr. Yeo by the appellant under the terms of the employment agreement is a bonus paid to an employee and be disallowed as a deductible expense beyond the limits stipulated under s. 39(1)(h) of the Income Tax Act 1967; or

is a share of profits by an independent consultant under the terms of the employment agreement and be allowed as a deductible expense wholly and exclusively incurred in the production of gross income of the appellant pursuant to s. 33 of the Act;

(b) Whether the amount equal to the cost of economy air-fares from Malaysia to the United Kingdom for Dr. Yeo and his family is a deductible expense wholly and exclusively incurred in the production of gross income of the appellant pursuant to s. 33 of Act; or

is not a deductible expense which was incurred in a private and vacational nature by Dr. Yeo and his family.

In the event, the Special Commissioners decided in favour of the Revenue on both questions, dismissed the appeal and confirmed the additional assessment of income tax amounting to RM172,538.25 for the year of assessment 1979 in respect of which a notice of additional assessment dated 2 May 1981 was issued by the Revenue. Hence this appeal.

The facts as found by the Special Commissioners were:

The Appellant Company

The appellant is a private limited company which was incorporated on 1 May 1972 whose principal objects were that of an investment company. On 14 November 1978 the objects of the appellant company were enlarged to include the following -

> To provide consultant services in gynaecology, oostetrics, nephrology, anaesthesiology, gaestroanterology, cardiology, dermatology, haematology, oncology, radiotherapy and neuro, paediatric, traumatic, urological, thoracic, vascular and plastic surgery and in other branches of medicine and surgical practices and to provide facilities and services for outpatient and inpatient care, and other services in relation to the running of a medical practice.

The authorised capital of the appellant is RM100,000 divided into 100,000 shares of RM1 each made up as follows on 31 July 1973:

Class of shares	Authorised	Issued & fully paid
6% cumulative preference shares	RM 50,002	RM50,002
ordinary shares	RM 49,998	-
	RM 100,000	RM50,002

Dr. Yeo Onn Hock, a gynaecologist and obstetrician (Dr. Yeo) was the sole holder of the 50,002 preference shares until 1978. As at 31 July 1975, Madam Ong Siew Ha, the wife of Dr. Yeo (Madam Ong) was the holder of 8 ordinary shares until 1978. The shareholders of the appellant were Madam Ong and the four children of Dr. Yeo.

Dr. Yeo is the governing director of the appellant and Madam Ong is the Director-cum-Secretary. The appellant is the fully-owned subsidiary of Saledy (Jersey) Limited, a company incorporated in Jersey.

Dr. Yeo

De. Yeo is a citizen of Singapore. He holds a red Malaysian Identity Card bearing No. 8017580 which was issued to him by the Registration Office at Petaling Jaya, Selangor on 8 January 1966. He came to Malaysia in 1963.

By letter dated 17 June 1963, Dr. Yeo accepted the offer by Tan Maternity and Nursing Home of Kuala Lumpur to provide medical services on a monthly emolument of RM3,000 plus other benefits. He ceased this practice in 1965 upon expiry of the contract.

By letter dated 17 May 1963, Assunta Hospital of Petaling Jaya, appointed Dr. Yeo as its consultant with effect from 1 July 1963 on the terms and conditions stipulated therein. He ceased this practice in 1975.

By letter dated 12 September 1963, Dr. Yeo was appointed the Honorary Obstetrician of the Chinese Maternity Hospital, Kuala Lumpur. He was entitled to charge his own patients. He ceased to be a consultant at this hospital in 1974.

The Appellant's Business

On 1 August 1972, the appellant commenced business of running a medical clinic when it took over from Dr. Yeo the medical practice carried on by him in the Chinese Maternity Hospital.

The appellant has a clinic (Pantai Clinic) in the premises of the Pantai Medical Centre of which Dr. Yeo is the managing director. Dr. Yeo has been working at Pantai Clinic as its sole consultant since 1974.

The Employment Agreement

On 3 October 1972, the appellant entered into an agreement with Dr. Yeo. This agreement was entered into between the parties prior to the amendment of the appellant's memorandum of association. The relevant terms of the agreement in the appeal are:

> Clause 5: As remuneration for the services to be provided by the consultant under this agreement, the Employer shall pay the consultant -
>
> (a) RM3,000 per month plus 40% net profit of the clinic;
>
> (b) once in every two years, an amount equal to the cost of economy air fares from Malaysia to the United Kingdom by the normal commercial airline route for an individual, his wife and family subject to a maximum equal to the economy air fares of 6 adults. First such payment to be made in 1973.
>
> Clause 6: This agreement shall be deemed to have effect from 1 August 1972 and shall continue indefinitely, except as to the terms and conditions which may be varied from time to time by mutual agreement. Either party may, however, terminate this agreement by giving to the other party 6 months' notice in writing of his intention to do so.

The agreement further provides, *inter alia*, that the appellant should provide to Dr. Yeo full-time services of his staff in the clinic; free use of office with furniture equipment and other facilities necessary for the running of the clinic, and to reimburse Dr. Yeo all expenses reasonably incurred in the furtherance of the interests of the appellant or in the course of performance of his obligations.

By mutual consent, clause 5(a) was amended with effect from 1 August 1975 as follows:

> RM3,000 per month plus 40% net profit of the clinic subject to the share of profit not exceeding RM100,000 in any year.

Dr. Yeo admitted that the trips to the United Kingdom were private and vacational in nature. He visited his children who were studying there.

Assessment of Taxes

The Revenue had made assessments pertaining to the personal income tax on Dr. Yeo on the basis that he carried on a business.

In computing the chargeable income of the appellant, the Revenue had treated the fixed monthly remuneration paid to Dr. Yeo as director's salary and the additional remuneration based on the net profits of the clinic as bonus which was subject to bonus restriction by virtue of s. 39(1)(h) of the Income Tax Act.

The Revenue also disallowed the air-fares for Dr. Yeo and his family to the United Kingdom being expenses of a private nature and not incurred in the production of income for the medical clinic.

Hence for the year of assessment 1979, the Revenue issued an additional notice of assessment charging the appellant an additional sum of RM173,596.25, which sum the appellant disputes.

The Appellant's Case

The appellant contends that Dr. Yeo is not an employee but an independent consultant. There had been no restrictions in the past when he practised at different clinics. At present he renders medical services to the appellant and at the same time he also provides adminisitrative services to the Pantai Medical Centre. Being a non-citizen of Malaysia he does not want employment as it is illegal for him to accept such employment. For years the Revenue had assessed Dr. Yeo on the basis that he carried on a business.

It is further contended that s. 13 of the Act applies to an employee only and s. 39 (1) (h) is not applicable. The appellant has to pay Dr. Yeo his salary irrespective of profits because of the binding contract. Even if Dr. Yeo is an employee, the 40% net profit paid to him is still not a bonus because the same is paid under a contract. The payment made to Dr. Yeo was for services and not as the governing director. The appellant is legally bound to pay the air-fares to Dr. Yeo under the terms of the contract. There is no statute to restrict payment of air-fares.

The Law

The question then is whether Dr. Yeo is an **employee** under the Income Tax Act. Section 2 reads:

"employee", in relation to an employment, means:

(a) where the relationship of master and servant subsists, the servant;
(b) where that relationship does not subsist, the holder of the appointment or office which constitutes the employment.

"employer", in relation to an employment, means:

(a) where the relationship of master and servent subsists, the master;
(b) where that relationship does not subsist, the person who pays or is responsible for paying any remuneration to the employee who has the employment, notwithstanding that that person and the employee may be the same person acting in different capacities.

"employment" means:

(a) employment in which the relationship of master and servant subsists;
(b) any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.

On the facts, it seems clear that the relationship of master and servant does not subsist but paragraph (b) of each of the defintions clearly apply. The employment agreement refers to the appellant as the "Employer" and Dr. Yeo as the holder of the appointment of consultant which constitutes the employment. The appellant is responsible for paying the remuneration of RM3,000 per month to Dr. Yeo, notwithstanding that the appellant and Dr. Yeo are the same person acting in different capacities. The appointment of consultant is an appointment for which remuneration is payable. In my judgment, the employment agreement in this case is a contract of service not a contract for services *Wittaker v. Minister of Pensions and National Insurance* [1967]1 QB 156; *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 DLR 161; R*eady Mixed Concrete v. Minister of Pensions and National Insurance* [1968]1 All ER 433.

It was agreed by both parties before the Special Commissioners that the limits imposed by s. 39(1)(h) of the Act is only applicable to employees. Since I hold that Dr. Yeo is an employee in the instant case this section therefore applies in respect of the 40% share of the profits subject to a maximum of RM100,000 per year which is clearly a bonus : *The Director-General* of *Inland Revenue v. Highlands Malaya Plantations Ltd* [1988] 2 MLJ. 99.

The argument that Dr. Yeo, being a non-citizen and therefore the contract of employment is illegal is without merit as inspite of such illegality (if any) the income is nevertheless chargeable to income tax : *Mann v. Nash* [1922] 1 KB 752.

It is true that the Revenue had heretofore assessed Dr. Yeo on the basis that he carried on a business. Section 91(1) of the Act, however, authorises the Director-General to make an additional assessment in respect of insufficient assessment within twelve years after its expiration in any assessment year. See also non-applicability of estoppel in such cases in *Southendon-Sea Corporation v. Hodgson Ltd.* [1962] 1 QB 416.

Finally the issue of the air-fares. Dr. Yeo admitted that the visits to the United Kingdom were private and vacational in nature. To qualify for deduction under s. 33 of the Act the expense must be wholly and exclusively incurred in

connection with the production of gross income of the taxpayer. The fact that the expense is contractual is irrelevant for tax purposes. Being private and vacational the expense clearly cannot be both wholly and exclusively incurred in connection with the production of gross income of the appellant. The expense therefore is caught by s. 33 read with s. 39(1)(b) of the Act.

For the reasons stated, this appeal is dismissed with costs. The Deciding Order of the Special Commissioners dated 24 March 1983 is hereby confirmed.

SEMANTAN ESTATE (1952) SDN. BHD.

v.

THE GOVERNMENT OF MALAYSIA

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN
MOHD YATIM J.
[CODE NO. D4-21-4-89]
14 JUNE 1994

PRACTICE & PROCEDURE: Striking out writ of summons - Meaning of suit - Limitation - Whether there was continuing trespass - Res judicata - Whether there were special circumstances.

The plantiff was the registered owner and in possession of 700 acress of land (said land). The defendant is alleged to have taken possession of 250 acres of the said land wrongfully and/or without any legal right to do so sometime in December 1956. The plaintiff contended that the defendant and/or its agents had not conducted an enquiry or paid any award for land acquired. Prior to the present proceedings, the dispute over the acquisition of the said land had been brought to the Court for adjudication on two occasions.

Held:

[1] In the present suit the plaintiff is claiming a declaration and damages. The present suit is covered by s. 2(a) of the Public Authorities Protection Act. The word suit in the section not be given a restrictive meaning.

[2] The Collector in making the award was exercising a quasi - judicial function. Once the award was made he was *functus officio.* He cannot set aside his own award. The power of setting aside the award is vested in the High Court. Since the award has not been set aside, the defendant is still in lawful possession of the land. Therefore, the question of trespass or continuting trespass does not arise in this case.

[3] Since the same matter has been litigated earlier in the second *Semantan* case, the principle of *res judicata* applies to the present case. There are no special circumstances in the present case. The appellant had a remedy but had never availed himself of it. In the present case there has been actual decision by the High Court and the Supreme Court in the second *Semantan* case. The parties are the same and the basic issue raised before the Supreme Court and in